Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CYNTHIA WALTERS, Individually and as parent and natural guardian of MICHAEL DANIELLE WALTERS, a minor,

Petitioner,

versus

CITY OF ALLENTOWN and JEANNE COSTELLO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON PETITIONER'S CLAIM FOR PENSION FUND BENEFITS WHERE RESPONDENT'S PENSION PLAN PROVIDES THE CHILDREN OF THE DECEASED, WHETHER LEGITIMATE OR ILLEGITIMATE, EQUAL PENSION BENEFITS.

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STATEMENT OF CASE

As conceded by both parties, the facts necessary to resolve this matter are not disputed. The Petitioner, Cynthia Walters, is the mother of a minor child named Michael Danielle Walters who was born on January 25, 1988. As acknowledged in a written Paternity Agreement dated October 18, 1988, the father of this child was one Michael Daniel Costello. (Paternity Agreement, attached to Petitioner's brief.) In 1988, Michael Daniel Costello was a police officer for the City of Allentown. Officer Costello died of a heart attack on March 6, 1992 and was survived by his wife, Respondent Jeanne Costello. On or about July 17, 1992, Petitioner requested benefits under the City of Allentown Police Pension Fund, but was denied the benefits because Officer Costello was survived by a wife who was entitled to the benefits. The denial was based upon Section 143.20 of the Codified Ordinances of the City of Allentown which provides:

> 143.20 BENEFITS FOR SURVIVING SPOUSE OR DEPENDENT CHILDREN
>
> "A. Death in the Line of Duty if any police officer while in the actual performance of his or her duty is killed or so injured that he or she dies from the effects thereof, his or her surviving spouse shall be entitled to receive a pension equivalent to one-half (1/2) the salary received by the officer at the time of death, and any service increment the officer may have been entitled to at the time of death. (12580 § 1 12/7/83)
>
> In case there is no surviving spouse, or after the death of the surviving spouse, or in case of her

> or his remarriage, the pension and service increment shall be paid to the guardian of the deceased officer's dependent children, if any without abatement until the youngest child reaches the age of eighteen (18) years, after which all pension and service increment rights shall cease, with the exception that after the last child has reached the age of eighteen (18) years, then the surviving spouse who has since remarried, at this time will once again have his or her pension rights as a surviving spouse reinstated for the remainder of his or her life. (12580 § 1 12/7/83) . . . "

Allentown, Pa., Code § 143.20. Had Officer Costello not been survived by a wife, Petitioner's minor child, Michael Danielle Walters, would have shared in the pension fund regardless of her status as being born out of wedlock.

Upon these facts, the Court of Appeals affirmed the District Court's grant of Respondents' Motion of Summary Judgment.

ARGUMENT

I. There are no disputed facts that would preclude summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to Material Fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). When deciding a motion for summary

judgment, the court must view all facts and the reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. See *Continental Insurance Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir. 1982). Petitioners have, however, failed to state with any clarity that dispute exists as to any facts.

To prove that no genuine factual issues exist, a movant must present a factual scenario without any "unexplained gaps". *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970).

Each of the facts set forward as necessary to the resolution of the Respondents' motion for summary judgment was acknowledged by all of the parties in either pleadings or discovery. Indeed, a factual scenario without any unexplained gaps was presented as required in *Adickes v. S.H. Kress & Co., supra.* Judge Van Antwerpen observed on page one of his opinion "As conceded on page 1 of Petitioner's Brief and on pages 6 and 10 of Respondents' Brief, the facts necessary to resolve this matter are not disputed." (Judge Van Antwerpen's opinion, attached to Petitioner's brief.)

There can be no question that the Decedent, a City policeman entitled to pension benefits, died leaving a widow (Respondent Jeanne Costello) and an acknowledged illegitimate daughter (Petitioner's minor child). Both of these parties applied for pension benefits after his death and pursuant to the provisions of the pension ordinance, Respondent Jeanne Costello received benefits as the surviving spouse. Petitioners Walters attempted to bring this suit based on an allegation that the rejection of her application for benefits was based upon the child's

status as illegitimate, but admittedly has no evidence to indicate that this is true.

The case before this Court is almost a textbook example in which it is not the facts, but a legal question concerning the pension plan ordinance which presents the issues for resolution. It is in precisely such a case that a motion for summary judgment can avoid an unnecessary trial and simplify and streamline the process of adjudication.

II. The city pension plan, which provides that a child of the deceased is entitled to benefits if there is no surviving spouse, does not deny to an illegitimate child equal protection of the law.

A. Petitioner's brief fails to discuss the conflict among circuits on which it relies for review and therefore certiorari should be denied.

Petitioner's stated reason for seeking review by this Court rests upon an assertion that there exists among the circuits a conflict of opinion on the issue raised by Petitioner. Upon examination of Petitioner's Brief, it is evident that Petitioner has offered only a bald and conclusory assertion of conflict completely unsupported by argument or discussion. Petitioner fails to compare and contrast circuit court decisions since to do so would clearly support Respondent's position. For this reason, certiorari should be denied.

The Fourteenth Amendment of the U.S. Constitution provides in part, "No state shall deny to any person within its jurisdiction the equal protection of the laws". Although equality in the application of laws would

appear to be a simple matter, judicial review of equal protection cases has created a myriad of standards, tests and rules. It is clear, however, that being treated equally is the best that the equal protection clause can offer; it does not secure substantive rights other than those provided generally.

In equal protection analysis, illegitimacy as a classification is considered to be of quasi-suspect status, which requires a substantial relationship to a legitimate state interest in order to be sustained. *Clark v. Jeter,* 108 S.Ct. 1910 (1988). (This is a lesser standard of scrutiny than that accorded to classifications based on race, national origin or religion.) Under this standard, a classification based on illegitimacy must actually serve an important governmental interest and not simply arguably serve some rational basis.

Having set forth this general statement of the law on this topic, however, it must be pointed out that no such classification appears on the face of the pension ordinance. The concept of legitimacy is not mentioned anywhere in its provisions. As Judge Van Antwerpen pointed out in his opinion:

> On its face, Allentown, Pa., Code § 143.20 does not contain any reference to a child or children born out of wedlock, and only uses the words "dependent children" and "child". These words become relevant only if there is no surviving spouse in which case Respondents concede Petitioner's child would be entitled to benefits just as in the case of any other child. Accordingly, we are not dealing with an express provision of an ordinance classifying children but rather we are dealing solely with the *effect* of

> an otherwise neutral ordinance. There is, in fact, no direct evidence of purposeful discrimination in this case. Indeed, the sparse evidence before us is to the contrary. See Affidavit of Mayor Daddona, President of the Pension Fund, attached to Respondents' Brief (If Officer Costello was not survived by his spouse, Petitioner's minor child would have shared in the pension fund regardless of the child's illegitimacy.). (Judge Van Antwerpen's opinion, attached to Petitioner's brief.)

At best, Petitioner Walters' claim must be based on some perceived effect of the operation of the provisions of the ordinance. Although Petitioner Walters' pleadings do not articulate the manner in which they believe the pension plan discriminates against the minor child, presumably their contention is that because she is illegitimate, she wrongfully loses the support of her father upon his death. In fact, a reading of the ordinance provision shows that legitimacy has no bearing whatever on the receipt of benefits by a child. Petitioner's daughter was not excluded from receiving benefits because of illegitimacy. In order to receive benefits, a child has to be dependent, be a minor, and there must be no surviving spouse. In this case, it is only the existence of Jeanne Costello, the surviving spouse, which prevents Petitioner's minor child from being eligible for benefits, not her status as illegitimate.

Since the actions of the Respondents which resulted in Petitioner's failure to receive benefits for the child were not based on illegitimacy, but the provisions of the ordinance and the ordinance itself is neutral on its face, containing no reference, however oblique, to illegitimacy,

Petitioners may be relying on the effect of the ordinance to support the claim.

Although Petitioners may assume that any legislation that carries the effect of discrimination violates the equal protection clause, the Supreme Court has stated otherwise in *Washington v. Davis,* 426 U.S. 229 (1976). In this case the Court ruled that intent was the standard; a standard which requires purposefulness rather than merely a disproportionate impact upon a certain group. Where discrimination is not clear on the face of a statute, rule or, in this case, ordinance, it is necessary for Petitioners to establish intent. In *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977) the Court cited five types of evidence that, added with disparate impact, might show intent: extreme disproportionate impact, the absence of justification, historical background of the action, departure from normal procedural standards and departures from typically applied substantive rules. The Petitioners have supplied no evidence that would suggest that the ordinance was enacted for a discriminatory purpose, rather than the important governmental objective of providing support for the spouses of deceased police officers.

Perhaps Petitioners contend that, if the daughter were legitimate, then the child's mother would receive the benefits, as surviving spouse, and the child would, in effect, be provided for. However, this argument, should it be advanced by Petitioners, is not persuasive, because the very same consequences experienced by this minor child would occur to a legitimate, minor and dependent child whose parents have divorced and remarried. This result occurs to any child whose parent is not currently married

to the vested City employee at the time of death. Although it is rare for a retired or deceased member of this pension plan to have any minor children at this stage in life, this effect is much more likely to occur because of a divorce than because of illegitimacy. Judge van Antwerpen included a brief overview of sociological research supporting these points. He said:

> Without question, police work can be dangerous. Nevertheless, it seems fair to assume that more older police officers than younger ones will die, and that when they do they will be less likely to have minor children to support. When children do survive an officer, it would also seem fair to assume that those charged with upholding the law will not have more children born out of wedlock than those who are not so charged.
>
> Of far more consequence is the divorce rate produced by the stresses of police work. In such commonplace situations, the ordinance has the equal effect of denying benefits to divorced spouses even though they have children who were born in wedlock. To be sure, this may be remedied by a property settlement agreement or equitable share of a divorce settlement, but this is not a certain result. A putative father can acknowledge paternity and if he refuses, a court can determine parentage. This would give a child born out of wedlock all the rights of any other child. A father is also free to make voluntary provisions for a child born out of wedlock upon his demise. All these variables point more to an infrequent occurrence. They also point to a burden imposed by the Ordinance on some children who are not born out of wedlock. (footnotes omitted) (Judge Van Antwerpen's opinion, attached to Petitioner's brief.)

The Petitioners offered no evidence of any discriminatory practice or pattern. For these reasons, Petitioners have failed to show any disproportionate impact whatever.

Legitimacy is simply not an issue in these circumstances. If Mr. Costello had been unmarried at the time of his death, his daughter would have received benefits without regard to her status. If there is any unfairness in the provisions of the pension ordinance, it is an unfairness to any minor dependent child of a pensioner who does not live in the household of the surviving spouse. Such a result does not involve a protected class and does not rise to the level of a deprivation of equal protection. Petitioner has failed to support the existence of a cause of action against Respondents and the order of the lower court should be affirmed.

In this case Petitioners have failed to raise any inference of intent that would be necessary to prove a cause of action against the Respondents. Petitioners have failed to even allege that the ordinance has any disproportionate impact upon illegitimate children which would give rise to a cause of action for violation of equal protection. Further, Petitioners have failed to allege the existence of any of the types of evidence cited in *Arlington Heights v. Metropolitan Housing Development Corporation*, supra, which would support an allegation of intent to discriminate. Petitioners have failed to support the existence of a cause of action against Respondents and the Complaint should be dismissed.

Even assuming arguendo that the Petitioner had a cause of action against the Respondent, it would still be an insufficient reason for certiorari since the Petitioner's argument presents no new and important federal question

for this Court. Indeed, the importance of the Petitioner's argument can be measured by the fact that Petitioner herself failed to rely upon this basis as a reason for warranting review and by the fact that the Third Circuit Court of Appeals summarily affirmed the District Court's Opinion. Based upon the non-existence of a new and important federal question, certiorari should be denied.

CONCLUSION

For the foregoing reasons, Petitioner has failed to state a cause of action for violation of the right to equal protection of the law on behalf of Petitioner's minor. There is no genuine issue of material fact and Petitioner has shown nothing in the actions of the Respondents or in the effect of the pension ordinance to indicate that there is any liability on the part of Respondents. The petition for certiorari should be denied.

Respectfully submitted,

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